

October 30, 1998
L-98-23

TO: Peter A. Larson
Chief Financial Officer

FROM: Steven A. Bartholow
Deputy General Counsel

SUBJECT: Hampton Roads Shipper's Association -
International Longshoreman Association Fringe
(HRSA-ILA) Benefit Fund

This is in response to your memorandum requesting my opinion as to whether certain payments made to employees of Lambert's Point Docks, Incorporated, must be considered compensation to the employees under the Railroad Retirement and Railroad Unemployment Insurance Acts. For the reasons set forth below, it is my opinion that these payments are not compensation under the Acts.

The evidence was collected as a result of an audit of Lambert's Point Docks (LPD) by the Board's Audit and Compliance Section. LPD is a wholly owned subsidiary of Norfolk Southern Railroad. LPD operates pier facilities used for the loading or unloading of ships onto trucks and railcars in Norfolk, Virginia. LPD has been determined to be a covered employer under the Railroad Retirement and Railroad Unemployment Insurance Acts effective January 1, 1973. See Legal Opinion L-78-356. Hampton Roads Shipper's Association is an association of steamship owners, stevedores, terminal operators, steamship agents, and service organizations operating out of Norfolk. The Shipper's Association has never been determined to be a covered employer.

The International Longshoreman's Association (ILA) is a national labor union which represents dockyard workers. Finally, HRSA-ILA is an independent entity governed by a fourteen member board comprised of seven representatives from the Shipper's Association and seven representatives from the ILA. HRSA-ILA administers employee benefits for ILA members from funds collected from the Shipper's Association, as provided under the Hampton Roads collective bargaining agreement.

HRSA-ILA administers a Fringe Fund, from which payments are allocated to two purposes. ILA members who work for a Shipper's Association employer for a specified minimum number of hours

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within a year are eligible for vacation and holiday pay from HRSA-ILA, rather than from the employer. The ILA member claims vacation and holiday pay during a particular year, and receives a lump sum payment for vacation each December, and for holidays each June. These payments are funded by contributions from all Shipper's Association members based upon the hours ILA members have worked for each of them. ILA members may also be eligible to periodically receive Container Royalty payments from HRSA-ILA.

These payments are funded by assessments against each Shipper's Association member based upon tonnage of containers shipped, and were established to compensate eligible employees for work lost due to use of container freight shipment.

Initially, the vacation/holiday payments and the container royalty payments were administered from separate funds. By the time of the 1998 audit, assessments against employers for both payments were credited to one account, the Fringe Fund, from which both types of payments were made. HRSA-ILA reports all payments under both programs as wages subject to the Federal Income Contributions Act, and does not maintain records indicating at which Shipper's Association employer the ILA member gained the hours necessary to qualify for the payment.

Section 1(h)(1) of the Railroad Retirement Act generally defines compensation as any form of money remuneration paid to an employee for services rendered. Section 1(i)(1) of the Railroad Unemployment Insurance Act contains a substantially identical definition. While it is generally contemplated that compensation be paid by the railroad employer, prior opinions of this office have stated that payment made from a trust fund established by the employer on behalf its employees may also be compensation under the Acts. See Legal Opinion L-90-116.

In this case, however, the trust fund in question was neither established by an employer under the Acts, nor is it acting as a agent for such an employer. Unlike the "productivity savings" payments in L-90-116, both types of payments from the Fringe Fund are made from co-mingled contributions from both railroad and non-railroad employers, with the non-railroad employers being predominate. Payments are made by the third party (HRSA-ILA) to a universe of individuals which includes both employees covered under the Acts and individuals working for non-covered employers.

Finally, the contributing employers are unrelated to each other, except as members of the Shipper's Association.

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In view of these distinguishing features, the payments from HRSA-ILA differ from prior instances where the third party trustee distributed funds contributed by a railroad employer for the benefit of its employees. See Legal Opinion L-82-176 and

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L-87-66. Accordingly, in my opinion, the Fringe Fund payments to Lambert Point Docks employees are not creditable as compensation under the Railroad Retirement and Railroad Unemployment Insurance Acts.